6-1901-15540-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF LABOR AND INDUSTRY

M. Scott Brener, Commissioner,
Department of Labor and Industry, State of Minnesota,
Complainant,
vs.
Schwickert Company,
Respondent.

FINDINGS OF FACT, CONCLUSIONS AND ORDER

The above-entitled matter came on for hearing before Allan W. Klein, Administrative Law Judge, on October 30, 2003, in Mankato, Minnesota.

Appearing on behalf of the Commissioner of the Department of Labor and Industry (hereinafter "Complainant" or "Department") was Julie A. Leppink, Assistant Attorney General, 900 NCL Tower, 445 Minnesota Street, St. Paul, MN 55101-2127.

Appearing on behalf of Schwickert Company was Mark Viola, Director of Safety and Loss Control, 330 Poplar Street, P.O. Box 1179, Mankato, MN 56002-1179.

The record in this matter closed on November 14, 2003, upon receipt of the final brief.

NOTICE

Pursuant to Minn. Stat. § 182.661, subd. 3, this Order is the final decision in this case. Under Minn. Stat. § § 182.661, subd. 3, and 182.664, subd. 5, the employer, the employee, or their authorized representatives, or any party, may appeal this Order to the Minnesota Occupational Safety and Health Review Board within 30 days following service by mail of this decision and order.

STATEMENT OF ISSUE

Should the Commissioner's citation and penalty be upheld because an employee was in violation of a fall protection standard, even though he made a conscious evaluation of the hazard and determined that he would not be in danger?

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. During March of 2003, Schwickert Company was engaged in roofing work in connection with the renovation of an old Menard's store into an auto dealership to be known as Snell Motors Auto Car Dealership Building. This is located on Madison Avenue in Mankato. As part of its work on the project, Schwickert had to construct and install "curbs" around holes in the large flat roof. These curbs serve as bases for fans and other equipment used to provide exhaust fume removal, air conditioning, and similar air-related functions inside the building. The curbs are box like structures, made out of wood and then covered by sheet metal, that support the fans and other equipment.

2. On March 11, 2003, Senior Safety Inspector Roger Bock proceeded to the Madison Avenue site for a scheduled inspection. As he approached the site, he saw a person on top of the building roof with no apparent fall protection equipment. Bock parked his car in a McDonald's parking lot, and photographed the worker on the roof.[1]

3. The roof was a flat roof, and it was 18 feet from ground level to the eve height of the roof.

4. Bock proceeded to the building, and had an opening conference with a representative of the general contractor. He then asked the employee to come down from the roof, and spoke with him. Bock learned that he was Jay Backstrom, an employee of Schwickert's. There was no management representative from Schwickert's on the site at that time, but Backstrom was able to reach Schwickert's safety director, Mark Viola, by telephone. Bock determined that Backstrom had been on the roof, building and installing curbs. He did not have any fall protection or warning lines in place.

5. There were three Schwickert employees working that day. Two of them were inside the building, on a scaffold, handing tools and materials up to Backstrom, who was the only employee on the roof. The tools and materials were handed to Backstrom through holes that had been punched through the roof. Backstrom communicated with his fellow employees by talking through the holes. Backstrom did not receive any tools and materials by hauling them up the side of the building, nor did he have to go to the edge of the roof to shout to his fellow employees. Backstrom assessed the situation when he first went up on the roof, determined that he would not have to go close to the edge, and decided that there was no need for any fall protection. The closest that Backstrom got to the edge of the roof was approximately 90 inches, or 7.5 feet. There were no awareness barriers, warning lines, or other fall protection devices between Backstrom's work area and the edge of the roof. Backstrom had free and unobstructed access to the edge of the roof, at least that part of the roof edge closest to where he was working.

6. Bock informed Backstrom that he would be issuing a citation for the failure to provide fall protection, and as Bock left the work site, Backstrom and the other

Schwickert employees were in the process of erecting an awareness barrier to comply with the OSHA standard.

7. Bock proceeded to prepare an inspection report[2] to memorialize is findings and calculate a penalty. He concluded that Schwickert's violated 29 CFR 1926.501(b)(1), which requires the following:

> Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is six feet (1.8m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

29 CFR § 1926.501(b)(10) provides, in pertinent part, as follows:

> Except as otherwise provided in paragraph (b) of this section, each employee engaged in roofing activities on low-slope roofs, with unprotected sides and edges six feet (1.8m) or more above lower levels shall be protected from falling by guardrail systems, or a combination of warning line system and guardrail system, warning line system and safety net system, or warning line system and personal fall arrest system, or warning line system and safety monitoring system.

8. Bock also cited Schwickert with a violation of the training requirements for fall protection, but after speaking with Viola and obtaining documentation from him, the Department decided that it would not proceed with that citation.

9. Bock determined that the fall protection violation deserved a severity rating of "E" because the fall exposure was between 15 and 20 feet.[3] He then used that severity rating to determine that the unadjusted penalty was a "serious" one.[4] After assessing the employee exposure, the proximity to the hazard, and the duration of the hazard, he determined that the probability was "lesser." The penalty chart for a "lesser/E" penalty yields a figure of $2500. Bock determined that there was no fatality/repeat/willful multiplier required. He then calculated the discounts for size (40%), good faith (30%) and history (10%). These yielded a total penalty credit of 80%. Using that penalty credit, and the unadjusted penalty of $2500, Bock calculated the final penalty at $500.

10. On April 11, 2003, Acting Commissioner Robin N. Kelleher issued a Citation and Notification of Penalty to Schwickert. The first citation item was the violation of the fall protection requirement, and the second citation was for a violation of the training requirements. As noted earlier, that second citation was later dismissed. The Citation and Notification of Penalty proposed a penalty of $500.[5]

11. On April 23, 2003, Schwickert filed a Notice of Contest, contesting both citations. With regard to the fall protection violation, Schwickert contended: "No violation existed, employee was not working in an area of exposure." On July 9, 2003,

the Department issued its Summons and Complaint to Schwickert, rescinding the training violation but affirming the fall protection violation as issued.

12. On July 12, 2003, Schwickert filed its answers, and requested a contested case hearing before an Administrative Law Judge.

13. On August 29, 2003, the Department issued its Notice of and Order for Hearing, setting the hearing in this matter for October 3, 2003 in Mankato. The hearing was conducted on that date, and lasted for less than half a day.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge has jurisdiction to consider this matter under Minn. Stat. § § 182.661, subd. 3, and 14.50.

2. The Department gave Respondent proper notice of the hearing and has fulfilled all relevant substantive and procedural requirements of statute and rule.

3. The Respondent is an employer, as defined in Minn. Stat. § 182.651, subd. 7.

4. The Department has the burden of proof to establish, by a preponderance of the evidence, the occupational safety and health violation charged, and the appropriateness of the penalty proposed.

5. Respondent was in violation of 29 CFR 1926.501 (b)(1) on March 11, 2003 at the Madison Avenue worksite in Mankato, MN, when it allowed its employee, Jay Backstrom, to work within 7.5 feet from the unprotected side or edge of a roof which was 18 feet above the next lower level without fall protection.

6. The penalty amount and adjustments thereto were appropriately calculated for this violation pursuant to the MN OSHA Field Compliance Guide and Minn. Stat. § 182.666.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED that:

1. Citation No. 1, Item 1a, failure to employ a fall protection system, should be and hereby is AFFIRMED.

2. The appropriate penalty for this violation is $500.

Dated this 5th day of December 2003.

S/ Allan W. Klein
ALLAN W. KLEIN
Administrative Law Judge

Reported: Tape Recorded
(One Tape)

MEMORANDUM

Schwickert's basic position is that the Commissioner failed to establish that the employee had access to the hazard because there is no evidence to show that the employee actually went to the edge of the roof, nor is there any evidence to show that he would have any reason to go to the edge of the roof. Schwickert argues that the Commissioner must prove that he actually went to the edge of the roof, or was likely to go to the edge of the roof, either by the inspector observing him at the edge of the roof or by demonstrating circumstantial evidence to suggest that he must have (or likely would have) gone to the edge of the roof. The Commissioner, on the other hand, argues that the Department only need prove access to the zone of danger, not actual exposure to a fall at the roof's edge. The Commissioner argues that Backstrom's free access to the zone of danger is sufficient to establish access to the volative condition. Both parties cite past federal cases and a prior ALJ decision to support their positions.

The Administrative Law Judge concludes that the Department's interpretation of the law is correct. In the recent case of Secretary v. Davis Brothers Construction Co., 2003 WL 2178885 (O.S.H.R.C.), issued on August 1, 2003, a citation was dismissed because the inspector failed to do an adequate job of documenting the exact location or identity of a person on the roof – the inspector could not show who he was, or what he was doing up there. However, in the course of discussing what does have to be shown, the judge wrote:

> It is generally not difficult to prove exposure to a fall hazard, since the secretary need only prove that an employee had access to the zone of danger, and not actual exposure to the hazard itself. But some specific evidence regarding the employee who was allegedly exposed must be adduced. A violation must be predicated upon more than a blurry image of a nameless employee engaged in unknown activity.

In the Schwickert's case, there are no such doubts. We know who the employee was, and we know what he was doing. He believed, and Schwickert argues, that he is entitled to use "good judgment" to determine whether a hazard exists, and what kind of protection is appropriate. Backstrom never got closer than about 90 inches from the edge of the roof, and he did not believe that there was any hazard of his falling.

The standard which applies to this case is as follows:

> Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is six feet (1.8m) or more above a lower level shall be protected from falling by the use of guard rail systems, safety net systems, or personal fall arrest systems.

In the face of such a standard, Schwickert cannot rely on an employee's "good judgment" to say that 7.5 feet from an 18 foot drop is "safe enough" to eliminate the need for some sort of protection or warning.

At one time, OSHA considered writing a rule that would have specified when fall protection was required, and when it was not required, based upon the distance between a worker's worksite and the edge of the roof or floor. OSHA sought comments on whether there was a distance from an unprotected edge where a worker would be safe and no protection would be needed. OSHA suggested, as an example, a situation where employees were only required to work in the center of a floor, and that center was 10, 20, or 30 feet from the edge. Responses from both employers and employee groups caused OSHA to finally conclude:

> In conclusion, after careful and complete consideration of the entire record, OSHA has determined that there is no 'safe' distance from an unprotected side or edge that would render fall protection unnecessary."[6]

OSHA does recognize that there are situations where the distance to the roof's edge is so great, and the circumstances that might cause the worker to go there are so remote, that it will view the violation as *de minimus*. Fro example, a 1996 Letter of Interpretation suggested that when employees were working 50 to 100 feet away from an unprotected edge, and had been properly trained, the violation could be treated as *de minimus*.[7]

Whatever the outcome of a case with a 50 or 100 foot separation, the Schwickert's case here is not *de minimus*. An unobstructed separation of 7.5 feet, with no protection and no warning system, is a violation of the standard that can be cited and penalized.

A.W.K.

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[1] Ex. 2, photograph No. 1.
[2] Ex. 2.
[3] Ex. 3, Appendix VI-A at p. 17 of 23.
[4] Ex. 3, Table VI-2 at p. VI-22.
[5] Ex. 1.
[6] Preamble to current rule, found at 59 Fed. Reg. 40730 (August 9, 1994).
[7] Letter of Interpretation to Dr. J. Nigel Ellis, dated July 23, 1996.